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No. 76

In the Supreme Court of the United States

OCTOBER TERM, 1942

JESSIE WILLIAM MILLER, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	4
Summary of argument	9
Argument:	
I. Petitioner is not entitled to be furnished a verbatim transcript of the evidence at public expense	11
A. A verbatim transcript of the evidence is not essential to settlement of a bill of exceptions adequate for the complete exercise of the right of appeal in criminal cases	16
B. In the absence of an express statute a pauper defendant is not entitled to a verbatim transcript of the evidence at public expense	28
C. The forma pauperis statute does not authorize the Government to supply impecunious defendants with verbatim transcripts at public expense	38
D. The petitioner has no constitutional right to be furnished a complete verbatim transcript of the evidence at public expense	50
II. The judgment of the circuit court of appeals should be vacated and the cause remanded to the district court	53
Conclusion	56
Appendix	58

CITATIONS

Cases:	
Altis v. *State*, 109 Neb. 776	53
Beebe v. *State*, 106 Ohio St. 75	21
Benson v. *Christian*, 129 Ind. 535	18, 19
Betts v. *Brady*, No. 837, last Term, decided June 1, 1942	51
Black v. *Youmans*, 245 Fed. 460	24
Boykin v. *Huff*, 121 F. (2d) 865	50
Bradford v. *Southern Railway Co.*, 195 U. S. 243	42
Bradstreet, Ex parte, 4 Pet. 102	22
Bristol v. *United States*, 129 Fed. 87	40, 42

492928—42——1

Cases—Continued. Page

Buessel v. *United States*, 258 Fed. 811 ..... 17, 29
Cavagnaro v. *Latimer*, 50 F. (2d) 898 19
Chateaugay Iron Co., Petitioner, 128 U. S. 544 ..... 18, 22
Cheek v. *Thompson*, 33 F. Supp. 497 29
Cincinnati Soap Co. v. *United States*, 301 U. S. 308 33
Collier v. *State*, 13 Ark. 676 19
Coulston v. *United States*, 51 F. (2d) 178 ..... 19, 21, 29, 35, 52
Crumpton v. *United States*, 138 U. S. 361 ..... 40, 51
Dibble v. *Trulock*, 11 Fla. 135 21
District of Columbia v. *Clawans*, 300 U. S. 617 ..... 16, 50
Dobbs v. *State*, 5 Okla Cr. 475 21
Dredge v. *Forsyth*, 2 Black 562 17
Estabrook v. *King*, 119 F. (2d) 607 ..... 29, 35, 52
Evans v. *United States*, No. 315, October Term, 1940, certiorari granted, 311 U. S. 635, remanded, 312 U. S. 651 ..... 15, 52
Galloway v. *Fort Worth Bank*, 186 U. S. 177 42
Goldsby v. *United States*, 160 U. S. 70 ..... 40, 51
Hall v. *Gordon*, 119 F. (2d) 463 19
Hanna v. *Maas*, 122 U. S. 24 19
Hemphill v. *United States*, 312 U. S. 657 54
Holmes v. *United States*, 314 U. S. 583 ..... 7, 15
Hursh v. *Killits*, 58 F. (2d) 903 18
Independent Wireless Telegraph Co. v. *Radio Corporation of America*, 270 U. S. 84 14
Jeffries v. *State*, 9 Okla. Cr. 573 ..... 21, 36
Kay v. *United States*, 303 U. S. 1 54
Kessler v. *Strecker*, 307 U. S. 22 54
King v. *Wright*, T. Hard. 253, 95 Eng. Rep. 162 34
Kinney v. *Plymouth Rock Squab Co.*, 236 U. S. 43 ..... 42, 43
Knight v. *Illinois Cent. R. Co.*, 180 Fed. 368 19
Kouts v. *Superior Court*, 135 Cal. App. 699 21
Krauss Bros. Co. v. *Mellon*, 276 U. S. 386 17
Lees v. *United States*, 150 U. S. 476 17
Maresca v. *United States*, 277 Fed. 727 ..... 17, 29
Marr v. *United States*, 8 F. (2d) 231, certiorari denied, 270 U. S. 644 18
Martin v. *Superior Court*, 176 Cal. 289 35
Mayville v. *French*, 246 Ill. 434 19
McCoy v. *Able*, 131 Ind. 417 ..... 18, 19
Metzler v. *United States*, 64 F. (2d) 203 18
Michigan Insurance Bank v. *Eldred*, 143 U. S. 293 24
Middleton v. *Hartford Acc. & Indemnity Co.*, 119 F. (2d) 721 ..... 19, 22
Moder v. *United States*, 62 F. (2d) 462 ..... 29, 35, 52
Monsen v. *United States*, No. 647, October Term, 1940, certiorari denied, 312 U. S. 701 ..... 14, 15
Morgan, Ex parte, 122 Ind. 428 36

Cases—Continued. Page

Pearson v. *Grice*, 8 Fla. 214 19
People v. *Chetlain*, 219 Ill. 248 19
People v. *Gary*, 105 Ill. 264 19
Peterson, Ex parte, 253 U. S. 300 31
Planters' Oil Mill v. *Yazoo & M. V. R. Co.*, 150 Miss. 813 19
Poteet v. *County Commissioners*, 30 W. Va. 58 ..... 21, 22
Rainey v. *Grace & Co.*, 231 U. S. 703 46
Ray v. *United States*, 301 U. S. 158 54
Reeside v. *Walker*, 11 How. 271 33
Reetz v. *Michigan*, 188 U. S. 505 50
Ring v. *Maxwell*, 17 How. 146 33
Rosen v. *United States*, 271 Fed. 651 18
Sanders and Keefe v. *United States*, No. 151, present Term, certiorari denied, October 12, 1942 15
Sansome v. *Myers*, 80 Cal. 483 ..... 21, 24
St. Louis Southwestern Ry. Co. v. *Purcell*, 135 Fed. 499 20
State v. *Cooper*, 107 Tenn. 202 21
State v. *Craig*, 15 Wyo. 439 20
State v. *Garvin*, 87 Ind. App. 426 19
State v. *Klein*, 95 Conn. 451 35
State v. *Cooper*, 107 Tenn. 202 19
State v. *Wear*, 101 Mo. 414 20
State v. *Weygandt*, 35 Ohio App. 433 ..... 18, 20, 21
State v. *Vicknair*, 118 La. 963 53
State ex rel. Coella v. *Fenimore*, 2 Wash. 370 36
State ex rel. Mahoney v. *Ronald*, 117 Wash. 641 ..... 36, 53
State ex rel. Parmenter v. *District Court*, 111 Mont. 453 36
Tindall v. *Chicago & Northwestern Ry. Co.*, 200 Ill. App. 556 19
United States ex rel. Estabrook v. *Otis*, 18 F. (2d) 689 ..... 29, 52
United States ex rel. McNeill v. *Avis*, 108 F. (2d) 457 ..... 29, 52
United States v. *Chemical Foundation, Inc.*, 272 U. S. 1 32
United States v. *Fair*, 235 Fed. 1015 ..... 29, 35, 44, 45, 52
United States v. *Gildersleeve*, 193 U. S. 528 ..... 33, 37
United States v. *Sanges*, 144 U. S. 310 ..... 16, 40, 50
United States v. *Strewl*, 28 F. Supp. 87 ..... 29, 52
United States v. *Van Duzee*, 140 U. S. 169 50
Walker v. *United States*, 113 F. (2d) 314 ..... 24, 54
Weatherford v. *Wilson*, 3 Ill. 253 ..... 19, 22
Weber v. *Sneeringer*, 247 Ill. App. 294 19
Whitmore & Pegram v. *Coats*, 44 Mo. 9 19
Wiborg v. *United States*, 163 U. S. 632 54

Constitution and Statutes:

Constitution:
Art. I, sec. 9 33
Amend. V 50
Amend. VI 50
Act of April 29, 1802, 2 Stat. 156 40
Act of August 8, 1846, 9 Stat. 72 (28 U. S. C. 656) 39
Act of March 3, 1879, 20 Stat. 354 40

Constitution and Statutes—Continued. Page

Act of February 6, 1889, 25 Stat. 655 ... 40
Circuit Court of Appeals Act of March 3, 1891, 26 Stat. 826 (Judicial Code, § 122, 28 U. S. C. 219), Sec. 2 ... 40, 46
Act of July 20, 1892, as amended, 27 Stat. 252, 36 Stat. 866, 42 Stat. 666 (28 U. S. C. 832) ... 2, 33, 38, 39, 41, 42, 43, 45, 49
Act of February 19, 1897, 29 Stat. 536 ... 43
Act of February 13, 1911, 36 Stat 901 ... 45, 46
Act of June 22, 1931, as amended, 47 Stat. 326, 48 Stat. 781 (18 U. S. C. 408a) ... 4, 6
Rev. Stat.:
Sec. 828 ... 37
878 (28 U. S. C. 656) ... 51
Connecticut General Laws (1918), sec. 2229 ... 35
Indiana Revised Statutes (1881), secs. 260, 1405 ... 36
Montana Revised Code, sec. 8931 ... 37
Oklahoma Revised Laws (1910), secs. 1785–1788 ... 21, 36
Westminster II, 13 Edw. I, ch. 31 ... 17

Miscellaneous:
5 Comp. Dec. 650 ... 26
19 Comp. Dec. 760 ... 5, 13
9 Comp. Gen. 503 ... 52, 53
21 Comp. Gen. 347 ... 53
26 Comp. Dec. 362 ... 45
23 Cong. Rec. 5199 ... 42
61 Cong. Rec. 1167 ... 46
Criminal Appeals Rules, Rule VII ... 22
Department of Justice Appropriation Bill for 1942, pp. 706–707 ... 33
Department of Justice Circular No. 2426 ... 27
XX Encyclopedia Britannica, p. 576 ... 20
XXII Encyclopedia Britannica, pp. 644–645 ... 20
General Rule 33, January 22, 1941, Southern District of New York ... 27
H. R. 6494, 77th Cong., 2d Sess ... 30
H. Rep. No. 1951, 61st Cong., 3d Sess ... 45
Maguire, *Poverty and Civil Litigation* (1923), 36 Harv. L. Rev. 361 ... 40
Order of Supreme Court of February 28, 1898, 169 U. S. 740, 741 ... 45
Orfield, *Federal Criminal Appeals* (1936), 45 Yale L. J. 1223 ... 41
Report of the Director of the Administrative Office of the United States Courts to the Judicial Conference on Senior Circuit Judges on Compensation of Court Reporters in the Federal Courts, September 23, 1940 ... 26, 27
Rules 26, 28, C. C. A. 3 ... 46
Rules 10, 11, C. C. A. 4 ... 46
Rules 10, 18, C. C. A. 6 ... 46
Rule 11, C. C. A. 9 ... 46
S. Rep. 20, 67th Cong., 1st Sess ... 46, 47

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OPINIONS BELOW

The opinion of the circuit court of appeals on the merits (R. 1–5) is reported at 123 F. (2d) 715. The initial opinion of that court on applications for rehearing and for appointment of counsel and an order directing that a verbatim transcript of the evidence be prepared at the Government's expense and filed in the circuit courts of appeals (R. 9–10) is reported at 124 F. (2d) 849. The opinion denying these applications (R. 30–32) is reported at 126 F. (2d) 462.

JURISDICTION

The judgment of the circuit court of appeals was entered November 25, 1941 (Tr. 90). The applications for rehearing and for appointment of counsel and an order directing that a transcript of the evidence be prepared at the Government's expense and filed in the circuit court of appeals, were denied March 25, 1942 (R. 30–32). The petition for a writ of certiorari was filed April 21, 1942, and granted June 8, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a defendant in a criminal case who is appealing *in forma pauperis* is entitled to be furnished a verbatim stenographic transcript of the evidence at public expense,

2. Whether the judgment should be affirmed, or should be vacated and the cause remanded to give the petitioner an opportunity to prepare a new bill of exceptions by whatever means are available but without being furnished at public expense with a verbatim stenographic transcript of the evidence.

STATUTE INVOLVED

The Act of July 20, 1892, as amended [1] (commonly known as the *forma pauperis* statute), provides as follows:

[1] 27 Stat. 252, 36 Stat. 866, 42 Stat. 666 (28 U. S. C. 832, *et seq.*).

SEC. 1. Any citizen of the United States entitled to commence any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon appealing, upon filing in said court a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks in such suit or action or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal. In any criminal case the court may, upon the filing in said court of the affidavit hereinbefore mentioned, direct that the expense of printing the record on appeal be paid by the United States, and the same shall be paid when authorized by the Attorney General.

* * * * *

SEC. 5. Judgment may be rendered for costs at the conclusion of the suit as in other cases: *Provided,* That the United States

shall not be liable for any of the costs thus incurred.

STATEMENT

Petitioner and his wife were indicted in the District Court of the United States for the Western District of Arkansas for kidnapping in violation of the Act of June 22, 1931, as amended, 47 Stat. 326, 48 Stat. 781 (18 U. S. C. 408a). The indictment (R. 11–12), which was in one count, charged that by means of false representations the defendants inveigled Dorothie Crawford Garner to accompany them from DeQueen, Arkansas, to a point near McKinney, Texas, for the purpose of compelling Dorothie to work for them, and that by means of threats and violent beatings they held her in involuntary servitude from August 28, 1939, to February 29, 1940, when she escaped. The indictment further alleged that at the time of the kidnapping Dorothie, who was the illegitimate daughter of petitioner's wife by another man, was above the age of eighteen years and was married.

The defendants were represented by counsel appointed by the court and were tried before a jury. The evidence was reported in shorthand by the secretary to the district judge (R. 14, 18) but how the secretary came to report it does not appear.[1] The trial lasted seven days (R. 12, 18).

[1] In the Western District of Arkansas, in which this case arose, the secretary, a salaried employee of the United States, is "court reporter" (R. 14). The record does not show

The jury found the petitioner guilty of the crime charged (Tr. 6) but acquitted his wife. The petitioner was sentenced to seven years' imprisonment, later reduced to five years (Tr. 7, 7A; see R. 17).

The petitioner, still represented by one of the attorneys appointed by the district court, appealed *in forma pauperis* to the circuit court of appeals. The notice of appeal stated the contentions that the trial court erred in failing to direct a verdict for the petitioner and that the verdict was "contrary to the weight of the evidence" (R. 34). The bill of exceptions filed by the petitioner, however, did not include a full transcript or statement of the testimony but only those parts pertinent to the petitioner's contention that he did not violate the kidnapping statute because he was a "parent" of the kidnap victim, and she a "minor," within the meaning of the statutory exception of kidnapping "of a

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whether the judge requires him to make the notes for the judge's use or whether the secretary makes them on his own initiative in the hope that he will be paid to transcribe them by one of the parties in accordance with a practice existing in a few rural districts (see pp. 26–27, *infra*). The United States has no arrangement with him under which he is obliged to supply it with transcripts free of charge in cases in which the United States is interested, but he has on occasion done such work without charge when it did not interfere with his regular duties. Under the rulings of the Comptroller General, the Government may not compensate him for this work. See 19 Comp. Dec. 760. Neither may the Government require him to do such work since it is outside the scope of his official duties.

402928—42——2

minor, by a parent thereof."[3] Similarly, petitioner's assignments of error (R. 36–37) and brief in the circuit court of appeals raised only the questions posed by this defense. The circuit court of appeals ruled that the case was not within the exception and affirmed the conviction (R. 1–5).

Petitioner's brief in the circuit court of appeals stated that he would have assigned as error and contended that the verdict was against the weight of the evidence, if he had had funds sufficient to pay the stenographer for transcribing the testimony so that it might be incorporated into his bill of exceptions. But the petitioner did not, prior to the judgment affirming the conviction, ask the circuit court of appeals or the trial court or the Government either to furnish a full transcript or to assist in preparing a narrative statement for use on appeal.[4]

After the decision of the circuit court of appeals, however, the petitioner, appearing *pro se*,

[3] See 48 Stat. 781 (18 U. S. C. 408a).

[4] A letter from the trial judge's secretary to the Assistant United States Attorney states that shortly after petitioner was sentenced counsel inquired as to the approximate cost of a full transcript and was told by him that the cost would be from $500 to $600 for a record 700 to 800 pages long. Counsel then said that such an amount could not be paid, but later informed the secretary that petitioner's wife had provided $100 to be used in prosecuting an appeal and offered to pay him $50 for preparing the transcript which ultimately was filed. Copies of this letter and of other letters setting forth other relevant information have been made available to counsel for the petitioner and are printed in the Appendix, pp. 58–71, *infra*.

filed a "Petition for rehearing and writ of certiorari" (R. 5–8) in which he requested that the trial court be directed "to have prepared at Government expense, a full and complete record of all the testimony given in the case," and to forward it to the circuit court of appeals for consideration (R. 5). The petition alleged that "The evidence did not support the verdict" (R. 6) and included a "Statement of the Case" designed to show that the alleged victim of the kidnapping had requested the petitioner to take her to Texas and then had stayed there voluntarily (R. 6–8).

The circuit court of appeals entered an order directing the Government to respond to the application (R. 10). In an opinion filed concurrently the court explained that its purpose was to avoid a repetition of the proceedings in *Holmes* v. *United States,* 314 U. S. 583; in that case a judgment affirming a conviction because there was no bill of exceptions had been vacated by this Court upon consent of the Government when, on certiorari, it appeared that a bill of exceptions satisfactory to both parties could be settled (R. 9–10).[6]

The Government filed a detailed response in accordance with this order (R. 10–18). It alleged

[6] No question as to the obligation to supply a verbatim transcript was involved in *Holmes* v. *United States, supra.* The United States had objected to the defendant's proposed bill of exceptions as inaccurate and inadequate and it developed on certiorari that the inaccuracies and inadequacies probably could be remedied by mutual consent.

that the evidence did support the verdict. In regard to the possibility of procuring a transcript, it explained that the secretary to the trial judge had taken down all the proceedings in shorthand; that he had been ready to transcribe his notes upon payment of his customary charges but the petitioner had not ordered the transcription; that the Government could not lawfully pay the cost of procuring a transcript or require the trial judge's secretary to furnish one free of charge; and that, in any event, the secretary could not reasonably be asked to furnish a transcript at that late date because it would interfere with his official duties.*

To the foregoing response petitioner answered, saying that he had repeatedly requested his attorneys to raise the question of the sufficiency of the evidence but that they had refused on the ground that he had no money to procure a transcript (R. 25); also he alleged again that the evidence proved his innocence (R. 18–30).

* On July 10, 1942, after the writ of certiorari was issued herein, the United States Attorney communicated with the trial judge's secretary and was informed that both he and the trial judge would be "very reluctant" to furnish a transcript, but that he had donated his services in taking shorthand notes of the trial and would be willing to dictate them into a dictaphone so that the United States might have a transcript made from the dictaphone records. The secretary estimated that the typing of the transcript would cost from $500 to $600. The United States Attorney also stated that it would be "next to impossible" for the secretary to type the transcript and at the same time keep up with his regular work. See Appendix, pp. 58–59, *infra*.

The circuit court of appeals thereupon denied the application for an order directing the Government to supply the complete transcript (R. 32). The opinion filed contemporaneously with the order explained that the court had never had any intention of reopening the case to bring in questions not raised by the record unless the Government consented thereto (R. 30–32).

SUMMARY OF ARGUMENT

I

A verbatim stenographic transcript of the evidence is not a necessary part of a bill of exceptions. In legal theory the sole requirement is that the substance of the evidence showing the question of law shall be stated under the seal of the trial court. In practice such bills can readily be prepared from recollection or from notes made at the trial. Moreover, the law supplies ample aid to a defendant seeking to prepare such a bill, even to the extent of requiring the trial judge to use every available means to correct a *bona fide* draft tendered by a diligent defendant. Unquestionably, therefore, the petitioner is right in conceding that a verbatim transcript of the evidence is not necessary for him to question on appeal the sufficiency of the evidence to support his conviction. And, since he does not need a transcript for that purpose, the Court would not order the Government to furnish one even if it had power to do so.

In the federal courts there is no official report of the proceedings and a stenographic transcript

has never been available except to persons able to compensate a private reporter. This practice, as well as many decisions, attests to the rule that the Government is under no obligation to supply a verbatim transcript of the evidence to a pauper. We agree that a modern reporting system should be established in the federal courts but we submit that for the courts to make so radical a change from the existing rule would usurp the functions of the legislature. Three other reasons also show that the courts should not impose the duty on the Government. First, it is settled that the power to employ a stenographer rests upon the power to tax costs, and costs cannot be taxed against the Government. Second, the Constitution forbids expenditure of monies in the absence of an appropriation by Congress. In view of the large expenditures which supplying reporters and transcripts to poor defendants would entail, the failure of Congress to make an appropriation for that purpose shows that no such expenditures were intended. Third, the fact that Congress has expressly specified some services to be supplied free to paupers is a strong indication it has assumed no other obligation.

The existing *forma pauperis* legislation neither expressly nor impliedly confers upon indigent defendants the right to a verbatim transcript of the evidence. The petitioner's argument is that such an intention is to be implied because the right to appeal is dependent upon the availability of such

a transcript. But the argument is unsound; there are other adequate means of preparing bills of exceptions.

The Fifth Amendment does not require that the petitioner be furnished a verbatim transcript. The right to appeal is statutory and, so long as all may exercise that right by one means or another, it is not arbitrary or capricious for the Government to allow those who have the means to use stenographic transcripts without supplying such transcripts to paupers.

II

Although there has been a consistent failure to assert petitioner's rights at the proper time, we agree that the cause should be remanded to give him the opportunity to prepare a bill of exceptions by any available means but without being furnished the verbatim transcript at the expense of the public or the judge's secretary. The petitioner personally has sought to assert his rights at all times and the neglect or errors in procedure were made by counsel appointed by the court.

ARGUMENT

I

PETITIONER IS NOT ENTITLED TO BE FURNISHED A VERBATIM TRANSCRIPT OF THE EVIDENCE AT PUBLIC EXPENSE

Introductory.—The petitioner seeks to procure a verbatim stenographic transcript of all the evi-

dence at his trial in order that he may raise on appeal from the judgment of conviction the question whether the evidence was sufficient to support the jury's verdict. The Government agrees with the petitioner that he was entitled to raise that question and, to that end, to present to the trial judge and have allowed a bill of exceptions showing what was the evidence against him. The controversy concerns whether he has followed a correct course for preparing such a bill.

The easiest way to prepare a bill of exceptions is to arrange for a verbatim stenographic transcript. In the instant case the testimony was reported in shorthand by the secretary to the trial judge—whether or not at the request of the judge does not appear[1]—and the secretary, in a private capacity, was willing to transcribe his notes upon being paid fair compensation for his services (see p. 8, *supra*). But this course was closed to the petitioner because he lacked the necessary money.

A second course, which the petitioner might have followed, was to prepare a bill of exceptions from memory, aided by notes kept by one of his attorneys at the trial, and by the recollection of witnesses or bystanders. If the petitioner had prepared a bill of exceptions in this way and had

[1] The secretary billed the petitioner's attorney at a *per diem* rate for attending the trial. See Appendix, p. 67, *infra*. It is at least a possibility therefore that the secretary made the notes in a private capacity and not as secretary to the judge.

tendered it to the trial judge, it would have been the judge's duty to give the petitioner affirmative assistance in making the bill accurate and to use, so far as necessary, every means available for that purpose, including his own notes or any notes made for him by his secretary. It is the Government's position that the petitioner should have followed this course. It is conceded by the petitioner that by this procedure a bill of exceptions could have been easily settled in the instant case (Br. 17).

The third course conceivably open to the petitioner was to obtain an order directing the Government to pay the cost of the verbatim transcript. The judge's secretary was willing to make dictaphone records from his notes, although the pressure of his regular work made it impossible to do more; and from the dictaphone records a typewritten transcript could be prepared at a cost of between $500 and $600.* See p. 8, *supra*. The petitioner made no attempt to secure such an order prior to the decision of the circuit court of appeals but on a petition for rehearing he belatedly sought to follow that course. The same contention is renewed here, both directly by the

*The Government is prohibited by statute from paying compensation to the judge's secretary for transcribing the notes even though it is clear that the Government cannot require him to make the transcription as part of his duties. 19 Comp. Dec. 760. In the instant case, however, this problem is avoided by the willingness of the secretary to make dictaphone records free, for another person might be employed to do the typing.

argument that the Government should be ordered to pay the cost of typing a transcript, and indirectly by the suggestion that the secretary should be required by the judge to take time off from his other duties to prepare a complete verbatim transcript for the petitioner. It is the Government's position that this course has never been open to the petitioner, and that neither he nor any defendant in a criminal case is entitled to have a complete verbatim stenographic transcript of the evidence at public expense.*

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* In our memorandum in opposition to the petition for certiorari we suggested that the petition should be denied on the ground that the petitioner's attempt to procure a transcript came too late. He raised no question of the sufficiency of the evidence to support his conviction and made no application for an order directing the Government to supply him with a transcript until after the decision of the circuit court of appeals. That court denied the petition for rehearing without passing upon the merits of the petitioner's new contention on the ground that it had decided the only question presented on the appeal. This was in accordance with its Rule 18 which provides that "the sole purpose of a petition for rehearing is to call attention to matters of law or fact inadvertently overlooked by the court as shown by its opinion." Moreover, its action was also in accordance with the general rule that an appellate court will not consider questions raised for the first time on a petition for rehearing. *Independent Wireless Telegraph Co.* v. *Radio Corporation of America*, 270 U. S. 84. It seemed, therefore, that it could scarcely be said that the court below had abused its discretion in failing to entertain the application on its merits, and that for that reason the petition for certiorari should be denied. Indeed, in *Monsen* v. *United States*, No. 647, October Term, 1940, this Court denied certiorari, 312 U. S. 701, although the Government conceded that the writ should

The chief issue in the instant case, therefore, is whether the petitioner was bound to follow the second course exclusively or whether the third course was also open to him.[10] In support of our position we shall show (A) that a verbatim transcript, although convenient, is not essential to settlement of an adequate bill of exceptions either in legal theory or in the practicalities of preparing the bill; (B) that in the absence of an ex-

issue unless the petitioner by failing to raise the question of his right to a verbatim transcript before the decision on appeal had lost his standing to raise it. See also *Sanders and Keefe* v. *United States*, No. 151, present Term, certiorari denied October 12, 1942. On further consideration it seems that this case is peculiar in that the petitioner did not acquiesce in his attorneys' failure to question the sufficiency of the evidence and repeatedly urged them to raise the question. We discuss the significance of this fact in Point II, pp. 54–57, *infra*.

[10] This issue has never been argued before the Court on the merits but it has been raised in several petitions for certiorari. In *Evans* v. *United States*, No. 315, October Term, 1940, certiorari was granted, 311 U. S. 635. The case was remanded upon stipulation (312 U. S. 651) when the Government ascertained that a stenographer had taken shorthand notes which it could cause her to transcribe without additional cost. The case was wholly unlike the instant case because the stenographer was paid a salary to act as secretary to the district judge and to furnish verbatim transcripts of evidence without charge whenever the Government should require; in the instant case no such arrangement exists. In *Monsen* v. *United States*, No. 647, October Term 1940, and *Sanders and Keefe* v. *United States*, No. 151, present Term, the petitioners sought to raise the issue but certiorari was denied. See p. 14, n. 9, *supra*. *Holmes* v. *United States*, 314 U. S. 583, did not involve this issue. See p. 7, n. 5, *supra*.

press statute the Government is under no obligation to, and indeed cannot lawfully procure and furnish transcripts at public expense; (C) that no statute grants a defendant proceeding *in forma pauperis* the right to be supplied with a transcript at public expense; and (D) that the Fifth Amendment does not require as a prerequisite to a lawful conviction that a poor defendant be supplied with a transcript in order that he may have a convenience to his defense obtainable by others.

A. A VERBATIM TRANSCRIPT OF THE EVIDENCE IS NOT ESSENTIAL TO SETTLEMENT OF A BILL OF EXCEPTIONS ADEQUATE FOR THE COMPLETE EXERCISE OF THE RIGHT OF APPEAL IN CRIMINAL CASES

The right to appeal in criminal cases is statutory. *District of Columbia* v. *Clawans*, 300 U. S. 617, 627; *United States* v. *Sanges*, 144 U. S. 310, 319, and cases cited. It is a mistake therefore to speak, as the petitioner does throughout his brief, of some inherent power in a trial court in a criminal case to facilitate the defendant's appeal. The question is what procedure did Congress establish and what rights did Congress confer upon the defendant. But since neither the procedure nor the defendant's rights are described in detail by statute, it is held that Congress intended to make applicable to criminal cases the procedure of preserving questions for review by

bill of exceptions, which originated in the statute of Westminster II, 13 Edw. I, ch. 31, and which in civil actions is part of our common law."[11] *Buessel* v. *United States*, 258 Fed. 811, 816–820 (C. C. A. 2); *Maresca* v. *United States*, 277 Fed. 727, 733 (C. C. A. 2).

A verbatim transcript of the evidence is not a necessary part of a bill of exceptions. The function of such a bill is to show the challenged ruling, together with so much of what occurred at the trial as will make plain the question of law. Where the alleged error rests upon a negative showing that there was no evidence to support the trial court's ruling, the bill must show that it contains all the evidence material to the point. Where, as in the present case, the question of law is whether there was any evidence to support the jury's verdict, it must appear that the bill contains all the relevant evidence adduced before the trial court. But this rule does not require that all the testimony shall be set forth at length in the words of the witnesses, or that the exhibits must all be included. It is enough that the bill of exceptions show the substance of the evidence. *Krauss Bros. Co.* v. *Mellon*, 276 U. S. 386, 389–

[11] To some extent, of course, the ancient practice has been modified. For example, it is no longer required that a separate bill be sealed for each ruling to be challenged on appeal (*Lees* v. *United States*, 150 U. S. 476), nor is it necessary to seal the bill when the exception is taken (*Dredge* v. *Forsyth*, 2 Black 562, 568).

391. Indeed, in criminal cases it formerly was a violation of the criminal rules to set out in the bill of exceptions a verbatim transcript of the evidence; the testimony and exhibits were required to be summarized and the irrelevant parts omitted, even when the sufficiency of the evidence was challenged. *Rosen* v. *United States*, 271 Fed. 651 (C. C. A. 2); *Marr* v. *United States*, 8 F. (2d) 231 (C. C. A. 8), certiorari denied, 270 U. S. 644; *Hursh* v. *Killits*, 58 F. (2d) 903 (C. C. A. 9); *Metzler* v. *United States*, 64 F. (2d) 203, 209–210 (C. C. A. 9).

Just as the form in which the pertinent evidence is set forth is immaterial, so it is immaterial from what source the court and parties obtain the facts which the bill of exceptions must contain. It is ordinarily the duty of the appealing party to prepare the bill and submit it to the judge. *Chateaugay Iron Co., Petitioner*, 128 U. S. 544, 547. He may rely on his or his attorney's notes taken at the trial; he may obtain the recollection of bystanders or have the witnesses repeat to him their testimony; or he may rely on notes taken by a stenographer.[12] When the bill is presented to the judge, he may test its accuracy against his recollection or his notes, or he may verify it by calling

[12] See *Benson* v. *Christian*, 129 Ind. 535; *McCoy* v. *Able*, 131 Ind. 417, 419; *State* v. *Weygandt*, 35 Ohio App. 433, 435; and cases cited pp. 19–22, *infra*.

witnesses to state what occurred at the trial."[13] The critical fact is the approval of the judge, witnessed by his seal or signature. "Minutes of the judge or clerk, or notes of a stenographer, cannot take the place of a bill of exceptions, but are only memoranda by the aid of which one may afterwards be drawn up." *Hanna* v. *Maas*, 122 U. S. 24, 26. Even a complete stenographic transcript is insufficient if no bill has been signed. *Cavagnaro* v. *Latimer*, 50 F. (2d) 898 (C. C. A. 3); *Knight* v. *Illinois Cent. R. Co.*, 180 Fed. 368 (C. C. A. 6). Conversely, the judge may not refuse to sign a bill of exceptions on the ground that a stenographic transcript is not available. *Middleton* v. *Hartford Acc. & Indemnity Co.*, 119 F. (2d) 721 (C. C. A. 5); *Coulston* v. *United States*, 51 F. (2d) 178 (C. C. A. 10), *semble*; *Hall* v. *Gordon*, 119 F. (2d) 463 (App. D. C.); *Weatherford* v. *Wilson*, 3 Ill. 253; *Weber* v. *Sneeringer*, 247 Ill. App. 294, 299; *State* v. *Garvin*, 87 Ind. App. 426; *Benson* v. *Christian*, 129 Ind. 535; *McCoy* v. *Able*, 131 Ind. 417, 419; *Planters' Oil Mill* v. *Yazoo & M. V. R. Co.*, 150

[13] *Collier* v. *State*, 13 Ark. 676, 679; *Pearson* v. *Grice*, 8 Fla. 214, 223; *Weatherford* v. *Wilson*, 3 Ill. 253; *People* v. *Gary*, 105 Ill. 264; *People* v. *Chetlain*, 219 Ill. 248, 263; *Tindall* v. *Chicago & Northwestern Ry. Co.*, 200 Ill. App. 556, 561–562; *Mayville* v. *French*, 246 Ill. 434, 438; *Whitmore & Pegram* v. *Coats*, 14 Mo. 9; *State* v. *Cooper*, 107 Tenn. 202, 210–211.

Miss. 813; *State* v. *Wear*, 101 Mo. 414, 417; *State* v. *Weygandt*, 35 Ohio App. 433, 435; cf. *St. Louis Southwestern Ry. Co.* v. *Purcell*, 135 Fed. 499 (C. C. A. 5). But see *State* v. *Craig*, 15 Wyo. 439, 446.

In practice, too, a stenographic transcript of the testimony is not a necessity. Through familiarity it has become a habit to look upon the convenience of a verbatim transcript of the evidence as an absolute necessity to the preparation of a bill of exceptions, and to forget that adequate bills of exceptions were prepared long before modern shorthand and practicable typewriters were developed.[14] It would seem today that preservation of a verbatim record of all the proceedings should be made an integral part of the official court procedure. See pp. 29–30, *infra*. But the desirability of such a system should not obscure the fact that these other devices for appealing questions even of the sufficiency of the evidence are available. Nothing more is required than diligence on the part of the accused and his attorneys in preparing their case and in keeping notes of the evidence for the prosecution. "A stenographic report, while helpful, is not indispensable in the settlement of a bill of exceptions."

[14] Marcus Tullius Tiro took down in shorthand the orations of Cicero but the first modern shorthand system was developed about 1835. XX Encyclopedia Britannica, p. 576. The first United States Letters Patent for a typewriter were issued in 1829 but the first practicable typewriter was not developed until 1867. XXII, *Id.*, pp. 644–645.

Coulston v. *United States*, 51 F. (2d) 178, 180 (C. C. A. 10). See *Dobbs* v. *State*, 5 Okla Cr. 475, 479, 485.[15]

Moreover, the law supplies ample aid to the party who is seeking to have a bill of exceptions settled and sealed without the aid of a transcript. If the opposing party objects to the proposed bill, he must show wherein it is deficient, thus giving the appellant an opportunity to correct inaccuracies and supply omissions. It is the duty of the trial judge to make the bill accurate and, when it is presented to him, to give affirmative assistance. *Dibble* v. *Truluck*, 11 Fla. 135; *State* v. *Cooper*, 107 Tenn. 202, 210–211; *State* v. *Weygandt*, 35 Ohio App. 433, 435; *Beebe* v. *State*, 106 Ohio St. 75, 80; *Poteet* v. *County Commissioners*, 30 W. Va. 58, 89; *Sansome* v. *Myers*, 80 Cal. 483; *Kouts* v.

[15] For these reasons it was said in *Jeffries* v. *State*, 9 Okla. Cr. 573, that a defendant who has employed counsel has no need of a stenographic transcript and no right to be supplied with one at public expense. But the court also held that counsel appointed to represent a defendant had no duty to prepare a bill of exceptions by notes and recollection and that the court reporter who was paid a salary by the state to report trials should in such a case supply the transcript free of charge. We submit that this distinction is untenable and that every attorney, whether retained by a party or appointed by the court, has a duty to take every step against a possible appeal, including making notes for preparing a bill of exceptions. The *Jeffries* case in any event is not authority for the petitioner's position because the only issue was whether the defendant had means of presenting his appeal without the stenographic transcript. If he did not, he was entitled to a transcript at public expense under the express provisions of Oklahoma Revised Laws (1910) §§ 1785–1788.

Superior Court, 135 Cal. App. 699; *Weatherford* v. *Wilson*, 3 Ill. 253. In *Poteet* v. *County Commissioners*, *supra*, the court said (p. 89):

> But the duty of the judge is not ended and fully discharged, when he merely refuses to sign a particular bill tendered, on the ground that the truth of the case is not fairly stated therein. He should go further. He should proceed with the aid of counsel to settle the bill and when settled to sign it. * * *

The judge will have his notes available and may call any necessary witnesses who can testify concerning the course of the trial. (See cases cited, p. 19, n. 13, *supra*.) Moreover, if the judge required his secretary to be in court and take notes, the judge certainly would call on his secretary so that notes could be used so far as necessary to settle the bill, even though no one paid for a complete transcript. Cf. *Middleton* v. *Hartford Acc. & Indemnity Co.*, 119 F. (2d) 721, 724 (C. C. A. 5). And, if the judge refuses to perform these duties, the remedy of mandamus is available. Cf. *Ex parte Bradstreet*, 4 Pet. 102; *Chateaugay Iron Co., Petitioner*, 128 U. S. 544, 557. This duty resting upon the judge is implicit in Rule VII of the Criminal Appeals Rules:

> The clerk of the trial court shall immediately notify the trial judge of the filing of the notice of appeal, and thereupon the trial judge shall at once direct the appellant or his attorney, and the United States

> Attorney, to appear before him and shall give such directions as may be appropriate with respect to the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings. * * *

Like every unsuccessful party, the petitioner had the opportunity to secure a bill of exceptions in the manner which we have described. Indeed, his counsel now concedes in his brief that an adequate bill of exceptions could have been prepared without first securing a complete verbatim transcript (Br. 15, 17). The record does not show why the petitioner and the attorneys then representing him did not follow that course but there is not the slightest basis for the suggestion in the petitioner's brief (Br. 17) that the trial judge did not hold the required conference and was in some way derelict in his duty. It seems that when it became apparent that a bill of exceptions containing all the evidence could not be prepared by the convenient method of purchasing a complete verbatim transcript, the petitioner and his attorneys simply did not go to the trouble of seeking to settle the bill by the other means available.

It may be argued that since an affirmative duty rests on the trial judge to aid in preparing the bill of exceptions (see pp. 21-22, *supra*) he is also obliged to make available by transcription the shorthand notes taken by his secretary. But

any such contention would be unfounded. The primary obligation rests upon the party; he may not shift it to the judge. *Michigan Insurance Bank* v. *Eldred,* 143 U. S. 293, 298. The duty of the judge, in other words, is to make complete and accurate the bill of exceptions tendered by the party, and not to prepare the bill. This limitation is recognized in the cases emphasizing the duty of the judge to render affirmative aid (see pp. 21–22, *supra*); for example, it was stated in *Sansome* v. *Myers,* 80 Cal. 483, 486, as follows:

> We must not be understood as intending to justify the too prevalent habit on the part of some attorneys of presenting an imperfect statement, thereby casting upon opposing counsel and the court the labor of piecing out and making complete a statement that should have been made perfect by the appealing party in the first instance. Such a course, whether it results from a design to gain an undue advantage, or from indolenee, should be severely condemned, and the party practicing it should be required by the judge to make and present a proper statement.

See, also, *Black* v. *Youmans,* 245 Fed. 460 (C. C. A. 8); *Walker* v. *United States,* 113 F. (2d) 314 (C. C. A. 9).

The distinction is a substantial one. The verbatim record of any trial includes many pages that are irrelevant on appeal and more that may

be summarized in a few words. Even where the sufficiency of the evidence is questioned there may be summarized or omitted such matters as cross-examination to test the credibility of witnesses, evidence of reputation, testimony on subsidiary issues the sufficiency of which is not in dispute, and much of the evidence for the defendant. By making the defendant and his counsel do this in the first instance much the greater part of the work of typing a verbatim transcript is avoided. To allow the party to make the secretary to the judge perform that unnecessary work, would be to place an unreasonable burden on the judge. It will scarcely be suggested that a party without attempting to keep notes and prepare a draft bill of exceptions may compel the judge to prepare the bill from his minutes. By a parity of reasoning the petitioner may not compel the judge to prepare the bill from minutes kept for him by his secretary or to donate the services of his secretary in spite of his need for those services in his regular work. (See Appendix, pp. 58–59, *infra*).

The fact that a verbatim transcript is not necessary to a sufficient bill of exceptions, either in legal theory or in practice, is reflected in the outmoded system of reporting which now exists in the federal courts. In spite of the development of shorthand and mechanical reporting, Congress has never established a system of official reporting as part of the administration of justice. As a result, reporting practices have grown up haphazardly

under the direction of the litigants with only occasional supervision by local court rules. In all the judicial districts the reporters are compensated by the parties, and no case is reported unless the parties request it or the court so orders. In most districts the practice is for the parties to arrange for a reporter and for the amount of the reporter's compensation. In others, the rules provide for designation of an official reporter and fix the fees which may be charged for reporting the case and for supplying any transcripts requested by the parties. In a few rural districts, as in the instant case, the "official" reporter is the secretary to the district judge, and supplements his salary by the fees which he charges any litigant who asks him to transcribe his shorthand notes for the transcript on appeal.[10]

The result of this system of reporting is that, as a rule, criminal trials are reported only if the defendant orders the report and pays the fees

[10] In a letter to the Attorney General dated February 23, 1926, the Comptroller General ruled that this practice was a violation of the Act of March 3, 1917, 39 Stat. 1106, because the fees are received "in connection with" the secretary's official duties. 5 Comp. Dec. 650.

For a more detailed description of the present reporting system than is given in this brief, see Report of the Director of the Administrative Office of the United States Courts to the Judicial Conference of Senior Circuit Judges on Compensation of Court Reporters in the Federal Courts, dated September 23, 1940, and a memorandum entitled "Memorandum Regarding Rule 82 (a)," dated August 26, 1937, prepared by Leland L. Tolman for the Advisory Committee, which is appended to the Director's report.

charged by a private reporter.[17] Likewise, even if the case happens to be reported, the notes are transcribed only if the defendant orders and pays for the transcription. The exceptions to this rule are the cases in which the Government orders a transcript and arranges to pay the contracting reporter out of appropriations made by Congress for that purpose; but since the Government has no right of appeal it is warranted in arranging for a reporter or for a transcript only in rare cases.[18] Moreover, the consistent practice has been, and the Comptroller General and inferior courts have ruled,[19] that the Government may not expend money to purchase a transcript for the defendant's use even though the evidence has already been reported in shorthand. There is no district, except possible the Southern District of New York,[20] in which the

[17] Even in the districts in which a so-called "Official Reporter" is appointed, he is not a court officer. *Loc. cit. supra* n. 16.

[18] Under date of July 18, 1933, the Attorney General instructed all United States Attorneys that "In the interest of economy and for the further reason that the Government does not have the right of appeal, the Department has decided to discontinue the practice of employing court reporters in criminal cases, except that cases of *outstanding importance* may be reported, provided the district attorney certifies that fact to the Department and secures its approval before incurring the expense." Department of Justice Circular No. 2426.

[19] See pp. 52–53, *infra*.

[20] By General Rule 33, adopted January 22, 1941, the District Court for the Southern District of New York appointed the Southern District Court Reporters, a partnership, as

Government has made arrangements permitting it to order a transcript without a charge being made. In short, under the existing system, as generally applied and understood, the only defendants in criminal cases who are able to obtain verbatim transcripts for use on appeal are those who are able to employ a private reporter.

B. IN THE ABSENCE OF AN EXPRESS STATUTE A PAUPER DEFENDANT IS NOT ENTITLED TO A VERBATIM TRANSCRIPT OF THE EVIDENCE AT PUBLIC EXPENSE

The foregoing summary of the nature of and means for preparing a bill of exceptions, and of the existing reporting system, demonstrates, we submit, that under the common law a stenographic transcript has never been essential in theory or practice to the exercise of the right of appeal.

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official court stenographer. The rule provides that the partnership shall furnish a stenographer to attend at all civil trials and proceedings where a record is to be made and fixes the compensation which the partnership shall be entitled to receive for attendance of a stenographer and for transcripts. No charges are allowed to be made to the Attorney General or the United States Attorney. In respect of criminal cases the rule provides:

"Where a record is required to be made, it shall provide a competent court stenographer to attend and report all criminal trials and proceedings had before the Judges sitting in this court or before the United States Commissioner for the Southern District of New York, but not otherwise.

"Said stenographers must furnish, without cost, to the United States Attorney for the Southern District of New York, or his assistants, as and when required, full and accurate transcripts of all criminal trials and proceedings so reported."

When Congress extended to defendants in criminal cases the right to appellate review, it must have intended to provide, except as it expressly stated otherwise, the same method of review upon a bill of exceptions as existed in civil actions at law. Cf. *Maresca* v. *United States*, 277 Fed. 727, 733 (C. C. A. 2); *Buessel* v. *United States*, 258 Fed. 811, 816–820 (C. C. A. 2). Specifically, it cannot be supposed in the absence of an express provision that Congress intended to change the practice and require the Government to supply pauper defendants with verbatim transcripts of the evidence. The existing practice attests the understanding of the courts and the bar that no such requirement exists. And the lower courts have so decided in numerous cases. *Moder* v. *United States*, 62 F. (2d) 462, 464–465 (App. D. C.); *Coulston* v. *United States*, 51 F. (2d) 178 (C. C. A. 10); *United States* v. *Fair*, 235 Fed. 1015 (N. D. Cal.); *United States ex rel. Estabrook* v. *Otis*, 18 F. (2d) 689, 690 (C. C. A. 8); *United States* v. *Strewl*, 28 F. Supp. 87, 88 (N. D. N. Y.); *United States ex rel. McNeill* v. *Avis*, 108 F. (2d) 457 (C. C. A. 3); *Estabrook* v. *King*, 119 F. (2d) 607, 610 (C. C. A. 8); *Check* v. *Thompson*, 33 F. Supp. 497, 499 (W. D. La.).

We are not concerned in the present case, we submit, with the faults of the existing system. We agree that a system should be established under which the evidence at every criminal trial

would be reported in shorthand or by mechanical means and transcripts supplied at public expense to defendants who are entitled to appeal *in forma pauperis*. A bill which would, among other improvements, accomplish that purpose has been recommended by the Judicial Conference of Senior Circuit Judges and has been introduced in the present Congress.[21] We submit, however, that for the courts to make so radical a change upon their own initiative would be to exceed the judicial function and assume the role of Congress.

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[21] The bill (H. R. 6494) is in the form of a new section (Section 5a) amending the Judicial Code and is designed to establish an official court reporting system for the federal district courts. It was drafted by a committee of the Judicial Conference of Senior Circuit Judges headed by Judge Parker, with the collaboration of the Department of Justice and the Administrative Office of the United States Courts. Section 5a (c) provides:

"*Duties.*—Some one of the official court reporters so appointed for each district court *shall attend at each session of the court and at each such other proceeding as may be designated by rule of procedure or order of court or by one of the judges of the court*, and shall record verbatim by shorthand or by mechanical means such of the proceedings as a judge of the court may direct or as may be required by rule of procedure or order of the court or as may be requested by any party to the proceedings. *All proceedings in criminal cases had in open court, whether in connection with plea, trial, or sentence, shall be thus recorded; in all other cases all proceedings had in open court shall be thus recorded unless the parties shall specifically agree to the contrary.* The original shorthand notes or other original records so taken shall be preserved in the records of the court for not less than five years. Upon the request of any party to any proceeding which has been so reported or of the judge of the

Three other reasons point to the same conclusion. Since Congress has made no provision of public funds for stenographic reporting, the power to order a transcript of the evidence to be made is ordinarily dependent upon a power to tax the expense as costs. *Ex parte Peterson,* 253 U. S. 300. But that basis for an order is lacking here, for the United States by becoming a party does not subject

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court, the official court reporter shall promptly transcribe his original records of the requested parts of the proceedings and attach thereto his official certificate, and shall then deliver the transcript to the party or judge making the request. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule of procedure or order of court. No transcripts of the proceedings of the court shall be considered as official except those made from the records taken by the official court reporter."

Section 5a (e) provides:

"*Fees.*—In addition to the amounts to which he may be entitled under subdivision (d) of this section, the official court reporter may charge and collect from parties, including the United States, who request transcripts such fees therefor, and no other, as may be established from time to time by the court subject to the approval of the judicial conference, except that when the reporting is provided for by contract, the fees collected for transcripts shall be those provided for in the contract. *The fees for transcripts furnished to a judge for his personal use and the fees for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose.* Except as otherwise provided in the Act of July 20, 1892 (ch. 209, 27 Stat. 252, as amended, U. S. C., title 28, secs. 832–836), and other laws relating to the prosecution of actions without prepayment of fees and costs; the official court reporter may require any party requesting a transcript, except the United States or its officers or agencies,

itself to liability for costs. *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 20–21.

Second, the magnitude of the alleged obligation which the petitioner contends rests upon the Government, and the failure of Congress expressly to authorize the Executive Department to perform the obligation, is the strongest proof that Congress does not intend such an obligation to exist. If an obligation rests upon the Government to purchase a transcript in a case in which by some chance shorthand notes have already been taken, then the Government must equally be obliged to supply a reporter at all criminal trials after which a pauper may wish to challenge the sufficiency of the evidence on appeal; no valid distinction can be based upon the adventitious circumstance that shorthand notes are already in existence. Manifestly, performance of an obligation to supply reporters at all criminal prosecutions against paupers and a verbatim transcript whenever a pauper wished to appeal, would result in large public expenditures. Under these circumstances, the failure of Congress

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to prepay the estimated fee therefor in advance of delivery of the transcript. He shall record and transcribe the proceedings in cases, civil or criminal, where one or more of the parties is allowed to prosecute or defend the action or to appeal without prepayment of fees, as he would in other cases; but no fees either for attendance and reporting or for furnishing a transcript of the testimony in such proceedings shall be required to be advanced him for such services or transcript by a party allowed to sue, defend or appeal without prepayment of fees." [Italics supplied.]

to make expressly the large appropriations which would be required reveals that Congress does not intend the Executive Department to supply them.[22] For the Constitution forbids the Executive Department to expend funds in the Treasury without statutory authorization.[23]

Third, the inference to be drawn from the failure of Congress to make provision for reporters and transcripts is rendered inescapable by the fact that Congress expressly dealt with the rights of pauper litigants in the Act of July 20, 1892, as amended, commonly known as the *forma pauperis* statute. If Congress intended pauper defendants to be supplied with transcripts of the testimony, it would have made the provision in that statute. We submit, therefore, that it is clear that the Government should not be ordered to supply the petitioner with a verbatim transcript at public expense unless the *forma pauperis* statute empowers the Government to expend money for that purpose. We shall show

[22] The item in the Appropriation Bill for stenographic reporting services, referred to by the petitioner (Br. 52), manifestly was not intended to authorize supplying transcripts to paupers in criminal cases. The Director of the Administrative Office of the United States Courts explained that the item was very small and covered such matters as disbarment proceedings. See Hearings before the House Committee on Appropriations on the Department of Justice Appropriation Bill for 1942, pp. 706–707.

[23] U. S. Const., Art. I, sec. 9; *Ring* v. *Maxwell*, 17 How. 146, 147; *Reeside* v. *Walker*, 11 How. 271, 290; *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 321.

presently that the *forma pauperis* statute does not grant that authority.

The petitioner pitches his case upon the argument that a trial court, as distinguished from an appellate court, has an "inherent power" to make an appeal effective. He argues (1) that in *United States* v. *Gildersleeve*, 193 U. S. 528, the Court recognized the "inherent power" of a trial court to supply paupers verbatim transcripts at public expense; and (2) that the question "is whether any barrier to such assistance has been erected since that time." But the argument rests upon an unsound premise. Criminal appeals are wholly a matter of statute; the courts have no inherent powers in that regard and appellants have no rights not granted by Congress. And for the reasons stated above, it is clear that Congress did not grant the right to be supplied with a complete verbatim transcript of the evidence at public expense.

The petitioner's reference to the "inherent power" of a court is unpersuasive for a second reason. We may assume *arguendo* that the doctrine on which he relies prevails in the federal courts. It is irrelevant here because the principle sustains only the power of the court to proceed, and to require its officers to proceed, without receipt of the customary charges. In *King* v. *Wright*, T. Hard. 253, 95 Eng. Rep. 162, the power was sustained because "it is only in effect ordering their own officers not to take fees" (95

Eng. Rep. at 163). And in *Martin* v. *Superior Court*, 176 Cal. 289, another case relied upon by the petitioner, the power of the court was said to be to require "every officer * * * to perform his duty without the payment of fees as fully as though the legal fees had been paid" (176 Cal. at 297–298). The secretary who took the notes in this case was not an officer of the court, and, as we have pointed out, in the federal courts there is no official court reporter in criminal cases. See also *United States* v. *Fair*, 235 Fed. 1015 (N. D. Cal.); *Coulston* v. *United States*, 51 F. (2d) 178, 180 (C. C. A. 10); *Moder* v. *United States*, 62 F. (2d) 462, 464–465; cf. *Estabrook* v. *King*, 119 F. (2d) 607, 609. And certainly the principle that a court will act and compel its officers to act without payment of fees or costs cannot be extended to authorize the court to order the Government to expend funds to supply reporters and transcripts notwithstanding the constitutional inhibition and the want of an appropriation by Congress.

The petitioner's statement (Br. 26) that a number of courts have held that "*without statutory authority*"[24] therefor, a court can require that an indigent defendant in a criminal case be furnished with a transcript * * * at public expense," is entirely misleading. The first case cited is *State* v. *Klein*, 95 Conn. 451. At the time it was decided, Connecticut General Laws (1918),

[24] Italics added.

section 2229, made provision for official stenographers who received a per diem salary, and expressly provided that the fee for a transcript "made for the court" should be paid "as other court expenses." Likewise, when *Jeffries* v. *State*, 9 Okla. Cr. 573, was decided, Oklahoma Revised Laws (1910), sections 1785–1788, made provision for official stenographers who received a salary, and expressly required them to furnish transcripts to paupers free of charge when necessary to an appeal; the question in the *Jeffries* case was whether a transcript was necessary (see also p. 21, n. 15, *supra*). The third case relied on by petitioner is *State ex rel. Coella* v. *Fenimore*, 2 Wash. 370, which was overruled as applied to a stenographer's transcript in *State ex rel. Mahoney v. Ronald*, 117 Wash. 641. The fourth, *Ex parte Morgan*, 122 Ind. 428, contains only a dictum that "a case might arise where it might be an abuse of discretion to refuse" an allowance for a stenographic transcript (p. 432); moreover, at that time Indiana Revised Statutes (1881), section 1405, expressly provided for salaried court reporters, and section 260 required court officers in a pauper's case to "do their duty without taking any fee or reward therefor from such poor person." The last of the cases cited by the petitioner to show the power of the state courts to furnish paupers with transcripts "without statutory authority therefor" is *State ex rel. Parmenter* v.

District Court, 111 Mont. 453; in that case the court quoted and relied upon Montana Revised Code, section 8931, which explicitly states that when the defendant is unable to pay for the stenographic transcript "the same shall be furnished him and paid for by the county."

Nor is the *Gildersleeve* case contrary to our position. The Court said (p. 530):

> The indigent defendant ought not to be deprived of availing himself of his writ of error because of his poverty, and, when the court has ordered the transcript in the interest of justice, the clerk ought not to be deprived of compensation.

This passing remark is not a precedent here for two reasons. In the first place, it is no part of the decision. All that the Court held was that "the order of the court requiring a service to be performed was sufficient authority as between the clerk and the Government for performance of the service and allowance of the proper fee therefor" (p. 530). In the second place, the dictum does not deal with the instant issue. The monies involved were the clerk's statutory fees under Rev. Stat. 828[22] for preparing a record on appeal and not the compensation of a stenographer. Thus, the *Gildersleeve* case deals only with the power of the court over its own officer and not with its power

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[22] The record in the *Gildersleeve* case (No. 198 October Term 1903) shows at page 4 the charges by the clerk. The item "1,264 folios and seal, at 20 cents" is plainly a charge

over outsiders (see pp. 34–35, *supra*). Moreover, without such a record, review was impossible, as this Court said. In the instant case, as we have shown and as the petitioner concedes (Br. 15, 17, 53), complete review, even on the question of the sufficiency of the evidence, was possible without a verbatim transcript of the evidence. Consequently, unlike the dictum in the *Gildersleeve* case, there is not involved in this case any question of the power of the courts to make it possible for paupers to exercise the right to review granted by Congress. The petitioner had ample means to exercise the right, and his case reduces to the contention that the Government should do the work for him. In the absence of an express statute that request must be denied him.

C. THE FORMA PAUPERIS STATUTE DOES NOT AUTHORIZE THE GOVERNMENT TO SUPPLY IMPECUNIOUS DEFENDANTS WITH VERBATIM TRANSCRIPTS AT PUBLIC EXPENSE

The *forma pauperis* statute (28 U. S. C. 832, *et seq.*) provides in Section 1 that any citizen of the United States may prosecute or defend to a conclusion, including the taking of all appeals, any criminal or civil proceeding in the federal courts "without being required to prepay fees or costs or

made at twice the usual fee of 10 cents a folio allowed by R. S. 828 for preparing a record. By the Act of August 7, 1882, 22 Stat. 344, the clerks in New Mexico were allowed to charge twice the usual statutory fee. The briefs and opinion show that the Court considered the case solely from the point of view of the statutory fees, whatever may be shown by papers in the Court of Claims which were not before it.

for the printing of the record in the appellate court or give security therefor"; and in criminal cases the courts may direct "that the expense of printing the record on appeal be paid by the United States." Section 2 provides for giving permission to proceed as a poor person after suit had been commenced. Section 3 requires the officers of the court to perform their duties and the witnesses to attend in all such cases, as in ordinary litigation. Section 4 authorizes the court to appoint an attorney. Section 5, which provides that judgment may be rendered for costs at the conclusion of the suit as in other cases, contains the express proviso "That the United States shall not be liable for any of the costs thus incurred."

It is apparent that this statute contains no express provision for supplying one entitled to proceed thereunder with a stenographic transcript of the evidence either for use at trial or on appeal. Petitioner urges that such a provision should be inferred (Br. 36), particularly from the direction that the expense of printing the record on appeal may be ordered to be paid by the United States. But the evolution and long-continued and uniform interpretation of the statute disclose that the inference is not permissible.

Act of August 8, 1846.[26]—Prior to 1846 no federal statute enabled paupers to enforce or defend their rights in the federal courts unless they paid or gave security for all the ordinary costs and

[26] 9 Stat. 72, 74 (28 U. S. C. 656).

fees.[27] The Act of August 8, 1846, authorized the district courts in criminal cases to order witnesses within the district, or within 100 miles of the place of trial, to be subpoenaed at the expense of the United States upon an affidavit showing that the defendant required the witnesses for his defense and could not pay the witness fees. Whether to issue the subpoena in such a case was left to the discretion of the court. *Crumpton* v. *United States,* 138 U. S. 361, 365; *Goldsby* v. *United States,* 160 U. S. 70, 73.

This legislation substantially improved the lot of persons accused of crime. In 1846 witnesses would ordinarily be found within the geographical limits fixed by the Act. No appeal or writ of error was allowed in criminal cases.[28] Consequently, the Act absolved poor defendants from most, if not all, of the expenses entailed in making their defense.

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[27] For a general account of the development of *forma pauperis* legislation in this country and England, see Maguire, *Poverty and Civil Litigation* (1923), 36 Harv. L. Rev. 361.

[28] The Act of February 6, 1889 (25 Stat. 655, 656), granted the right of appeal in cases of conviction of a capital crime. Prior to that time a review could be had in a criminal case only upon certificate of division of opinion in the circuit court (Act of April 29, 1802, 2 Stat. 156, 159); or, after 1879 (Act of March 3, 1879, 20 Stat. 354), by writ of error to the circuit courts in cases triable in the district courts if the sentence was imprisonment, or fine and imprisonment, or fine in excess of $300. The first statute allowing the right to a review in criminal cases generally was the Act of March 3, 1891 (26 Stat. 826). See *United States* v. *Sanges*, 144 U. S. 310, 319–322; *Bristol* v. *United States*, 129

Act of July 20, 1892.[29]—The Act of July 20, 1892, which, as amended, still governs all proceedings in *forma pauperis*, was the first federal legislation designed to improve the lot of poor litigants in *civil* cases. Section 1 provided that any citizen "entitled to commence any suit or action in any court of the United States" might commence such an action and prosecute it to a conclusion "without being required to prepay fees or costs, or give security therefor before or after bringing suit or action" provided that he made an oath setting forth his poverty. Sections 2, 3, and 4 of this Act were the same as they are at the present time (see p. 39, *supra*). Section 5 provided for a judgment for costs at the conclusion of the suit, with the express proviso "That the United States shall not be liable for any of the costs thus incurred."

It is apparent from the legislative history, as well as from the words of this enactment, that its sole purpose was to relieve paupers of paying the fees of court officers and witnesses. The statute did not deal at all with such expenses as the compensation of reporters whose presence, though desirable, was not an official part of the court proceedings. Likewise, the statute did not impose any obligation upon the Government to pay the costs and fees instead of the litigant. When he was asked how the court officers would receive

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Fed. 87, 88, 89 (C. C. A. 7). See also Orfield, *Federal Criminal Appeals* (1936), 45 Yale L. J. 1223, 1224–1225.

[29] 27 Stat. 252.

the usual fees in the event that the pauper did not succeed, Congressman Culberson, who was in charge of the bill, stated on the floor of the House that the costs and fees would not be paid, and explained (23 Cong. Rec. 5199):

> We are simply in these cases of charity and humanity compelling these officers, all of whom make good salaries, to do this work for nothing. *That is all the bill does.* There may be one such case upon a docket of five hundred; and they are not required to do much *ex officio* service. [Italics supplied.]

The proviso at the end of Section 5 was inserted out of an abundance of caution. Congress realized that the act would impose no obligations on the United States because the sole purpose was to relieve litigants of paying fees. It added the proviso to make its intention express without changing the meaning. *Ibid.*

Even as a measure dealing only with official costs and fees, the Act of 1892 had two strict limitations. It applied only to plaintiffs and not to defendants. See *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43, 45. And it did not apply to appellate proceedings. *Galloway* v. *Fort Worth Bank*, 186 U. S. 177; *Bradford* v. *Southern Railway Co.*, 195 U. S. 243. As a necessary corollary of these two limitations, it was recognized that the statute had no application in criminal cases. See *Bristol* v. *United States*, 129 Fed. 87 (C. C. A. 7).

Amendment of June 25, 1910.[30]—The foregoing decisions pointed out deficiencies in the provisions of the Act of July 20, 1892, and, in 1910, Section 1 was amended to read in its present form, with the exception that there was no provision authorizing the Government to pay the expense of printing the record in criminal cases. The purpose, as the Court held in *Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43, 45, was to remove the limitations pointed out above.

These changes brought criminal cases within the Act but they did not expand the services to be sup-

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[30] 36 Stat. 866. The changes made by this amendment are shown in the following print (new matter is in italics and words deleted have a line struck through them):

"SEC. 1. That any citizen of the United States entitled to commence *or defend* any suit or action, *civil or criminal*, in any court of the United States, may, *upon the order of the court*, commence and prosecute *or defend* to conclusion any ~~such~~ suit or action; *or a writ of error, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith* without being required to prepay fees or costs *or for the printing of the record in the appellate court* or give security therefor, before or after bringing suit or action, *or upon suing out a writ of error or appealing*, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action *or of such writ of error or appeal*, ~~which he is about to commence~~, or to give security for the same, and that he believes *that* he is entitled to the redress he seeks by such suit or action *or writ of error or appeal*, and setting forth briefly the nature of his alleged cause of action, *or appeal*."

plied free, or impose any liability upon the United States. Section 1 continued to deal only with "fees or costs," except that the pauper was now also relieved of prepayment "for the printing of the record". The final proviso to Section 5 declaring that the United States should not be liable for costs was left undisturbed by the amendment. Accordingly, when the issue involved in the present case arose in *United States* v. *Fair*, 235 Fed. 1015 (N. D. Cal.), it was held:

> * * * Congress did not intend that the United States should be liable for any of the costs incurred under the provisions of the act. * * *
>
> The act evidently applies only to such fees as those of the clerk or marshal, or some other officer of the court. * * *

Consequently, the court concluded that it had no power to order the Government to furnish a transcript of the testimony for the defendant's use on appeal in *forma pauperis* from a judgment of conviction.

The petitioner attacks the reasoning of this decision on the ground that it relies over-much on the proviso to Section 5. We submit, however, that the court followed precisely the course marked out by Congress. The court pointed out that the Act applied only to official fees; this interpretation was exactly what the sponsors of the bill had explained in Congress. The court relied upon the proviso as an express statement of the general pur-

pose; it was to insure that the court would thus recognize the limited purpose that the proviso was added in Congress. We think it is clear, therefore, that the present issue was rightly decided in *United States* v. *Fair, supra,* under the *forma pauperis* statute as it then stood.

Amendment of June 27, 1922.[31]—On November 5, 1919, the Comptroller of the Treasury ruled in answer to an inquiry by the Attorney General that the Attorney General could not lawfully print at the expense of the Government the record on a criminal appeal *in forma pauperis.* 26 Comp. Dec. 362. The effect of this ruling, except as the appellate courts consented to hear cases on typewritten records, was to cut off the pauper's right of appeal, for the Act of February 13, 1911, 36 Stat. 901, required a party appealing to the circuit court of appeals to file twenty-five printed copies of the transcript of record.[32] The Comptroller considered the situation a hard one requiring Congressional relief.

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[31] 42 Stat. 666.

[32] The purpose of this statute, as shown by its title and the report of the House Judiciary Committee (H. Rep. No. 1951, 61st Cong., 3d Sess.), was to diminish the expense of proceedings on appeal. Before its passage the clerks of the district and circuit courts charged for a written or typewritten transcript of the record in preparing the case for review in the circuit court of appeals, the fee for such service being fixed (R. S. § 828). The printing was done under the supervision of the clerk of the circuit court of appeals and, pursuant to the Act of February 19, 1897, 29 Stat. 536, and an order of this Court of February 28, 1898 (169 U. S. 740, 741), he received a fee of 25 cents per printed

Several months later the Attorney General sought to correct the situation by recommending to Congress that the *forma pauperis* statute be amended by adding what is now the final sentence of Section 1. S. Rep. 20, 67th Cong., 1st Sess. The sentence reads:

> *Provided*, That in any criminal case the court may, upon the filing in said court of the affidavit hereinbefore mentioned, direct that the expense of printing the record on appeal or writ of error be paid by the United States, and the same shall be paid when authorized by the Attorney General.

The amendment was reported favorably to the Sixty-sixth and Sixty-seventh Congresses with

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page for indexing the record, preparing it for the printer, supervising the printing, and distributing the copies. *Rainey* v. *Grace & Co.*, 231 U. S. 703, 706–707. In the case cited this Court held that the purpose of the provision of the Act of February 13, 1911, for the filing by the appellant in the circuit court of appeals of a printed record rather than a written or typewritten transcript was to eliminate the expense of the clerk's fee for supervising the printing and that the effect of the act was to repeal that fee in cases where the appellant followed the procedure set forth (231 U. S., at 708–709). The Act of February 13, 1911, does not, however, prevent the circuit court of appeals from hearing an appeal on a stenographic record. Section 2 of the Circuit Court of Appeals Act of March 3, 1891, 26 Stat. 826 (Judicial Code, § 122, 28 U. S. C. 219), authorized those courts to establish rules and regulations for the conduct of their business and several of the courts have made provision in their rules for hearing appeals in *forma pauperis* cases upon typewritten records. (See Rules 10, 18, C. C. A. 6; Rule 11, C. C. A. 9; cf. Rules 26, 28, C. C. A. 3; Rules 10, 11, C. C. A. 4.)

this explanation (S. Rep. 20, 67th Cong., 1st Sess.):

> The object of this bill is to amend the act of July 20, 1892 (27 Stat. L., p. 252), as amended by the act of June 25, 1910 (36 Stat. L., p. 866), to cover a defect pointed out by a decision of the Comptroller of the Treasury, dated November 5, 1919, in which he holds that notwithstanding the provisions of the above acts, a defendant in a criminal case who files an affidavit in forma pauperis is not entitled to have the record printed at the expense of the Government in cases in which an appeal is taken.

Senator Nelson, who sponsored the amendment on the floor, also explained (61 Cong. Rec. 1167):

> * * * the only change in existing law is the proviso at the end of the bill which authorizes the court to pay the expense of printing the record. That is the only change.

The amendment was adopted on June 27, 1922, thus putting the *forma pauperis* statute in its present form. Manifestly, it was intended to deal only with the specific hardship pointed out to Congress.

Petitioner's argument is that the proviso added by the amendment of June 27, 1922, which provides for paying the expense of printing the record, necessarily implies authority to take the earlier step of supplying the verbatim stenographic transcript from which the testimony is incorporated into the printed record. The argument is falla-

cious. It rests on the premise that a verbatim stenographic transcript of the evidence is a prerequisite to the preparation of a complete printed record. But, as we have shown above, ample means are available to prepare a complete bill of exceptions without the use of a verbatim transcript of the evidence; and such a transcript has never been treated as an essential part of appellate proceedings (see pp. 16–28, *supra*). To exercise his rights to the fullest extent the poor defendant did not need a verbatim transcript but he did need a printed record, and that is all the statute gave him.

It is improbable, moreover, that Congress would have made merely by implication such an extreme change in the administration of the criminal law. In the instant case, it is true, the petitioner seeks only to have the Government pay the cost of transcribing stenographic notes already existing. But if this obligation is created by the amendment, then the amendment must also require that the Government supply reporting service and verbatim transcripts to all paupers, for it can scarcely be suggested that Congress was so capricious as on the one hand to grant paupers the right to a transcript at public expense whenever a stenographer happened to take notes at the trial, while on the other hand it withheld the right to a reporter. Had this been intended, the innovation would surely have been mentioned, yet the committee reports and the debate in Congress expressly

limit the amendment to the precise situation reflected in the ruling of the Comptroller.

This amendment of June 27, 1922, was the final step in the development of the present *forma pauperis* statute. Congress has never abandoned its original purpose to exempt paupers from paying fees without imposing liability on any one to pay them instead of the pauper, except in the narrow provision for printing the record in criminal cases. Petitioner argues that the statute must be liberally construed in accordance with its benevolent purpose to permit paupers the same right to a full appeal that others can secure. We agree completely but, we submit, the conclusion which the petitioner would draw does not follow from his premise. As we have shown earlier in this brief, a verbatim transcript of the evidence is not necessary to prepare a bill of exceptions adequate to raise every issue in a case. To use a stenographic transcript is the easy way, and perhaps it is the best way; but it is by no means essential. Under our interpretation of the statute it is feasible for paupers to exercise fully their statutory right to appeal, and the question whether verbatim stenographic transcripts should be supplied free to paupers, like the question whether reporting should be made part of the court machinery, is one for legislative consideration.

D. THE PETITIONER HAS NO CONSTITUTIONAL RIGHT TO BE FURNISHED A COMPLETE VERBATIM TRANSCRIPT OF THE EVIDENCE AT PUBLIC EXPENSE

The petitioner argues (Br. 46–47), albeit faintly, that to deny him a verbatim transcript of the evidence is to deny him his constitutional rights. But it is settled that neither the guarantee of a fair trial by jury (Amend. VI) nor the guarantee of due process (Amend. V) carries a right to appeal. *United States* v. *Sanges*, 144 U. S. 310, 319, and cases cited; *District of Columbia* v. *Clawans*, 300 U. S. 617, 627; *Reetz* v. *Michigan*, 188 U. S. 505, 508. Hence, the contention must be that since Congress permits those who can afford to compensate a reporter to use a verbatim transcript on appeal, therefore Congress must place paupers upon an equal basis by supplying them with such transcripts.[23]

We submit that this contention is unsound without regard to whether the due process clause compels Congress in granting a right of appeal to take affirmative action to make it available to all who may wish to exercise it. Cf. *Boykin* v. *Huff*, 121 F. (2d) 865, 872 (App. D. C.). A pauper has ample opportunity to exercise his right to appeal on all questions even though he cannot procure a verbatim transcript of the evidence (see pp. 16–28,

[23] In passing it is appropriate to observe that if such a constitutional right exists, it is not self-executing. *United States* v. *Van Duzee*, 140 U. S. 169. And the right would, of

supra). The course which he must follow may be more difficult for him and his attorney, and in some cases less satisfactory, than the course open to men who are able to compensate a reporter; but it is clear that the due process clause does not require Congress to make appropriations to place paupers upon absolute equality in litigation with those who command larger means. Greater differences in treatment have been upheld than exist between the preparation of a bill of exceptions without a stenographic report and its preparation with such a report. A pauper cannot appeal as freely as one able to pay the costs and retain his own counsel for he must satisfy the court that his appeal is not frivolous. He may subpoena witnesses only from within a limited area and only in the discretion of the court. Rev. Stat. 878, 28 U. S. C. 656; *Crumpton* v. *United States*, 138 U. S. 361, 365; *Goldsby* v. *United States*, 160 U. S. 70, 73. And due process does not require that a pauper should have counsel at public expense in all cases in which counsel are "allowed." *Betts* v. *Brady*, No. 837, last Term, decided June 1, 1942. So long as other means of preparing a bill of exceptions are available, the right to equal justice under law is not denied to

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course, include the lesser right to have a reporter take down the evidence. The petitioner's contention must be, therefore, that every person who has been convicted without an opportunity to have a verbatim transcript of the testimony, has been convicted without due process of law.

paupers by failing to provide them with the convenience of a verbatim transcript of the evidence.[24]

For the foregoing reasons we submit that neither the *forma pauperis* statute nor any other rule of law authorizes the courts to require the Government to pay the cost of preparing for the petitioner a verbatim transcript of the evidence. The present reporting system reflects the opinion of the courts and bar that a verbatim transcript can be procured only by compensating a private reporter (see pp. 25–28, *supra*). The lower federal courts have consistently followed the decision in *United States* v. *Fair, supra*. *United States ex rel. Estabrook* v. *Otis* 18 F. (2d) 689, 690 (C. C. A. 8); *United States* v. *Strewl*, 28 F. Supp. 87, 88 (N. D. N. Y.); *Estabrook* v. *King*, 119 F. (2d) 607, 610 (C. C. A. 8); *United States ex rel. McNeill* v. *Avis*, 108 F. (2d) 457 (C. C. A. 3); cf. *Coulston* v. *United States*, 51 F. (2d) 178, 180 (C. C. A. 10); *Moder* v. *United States*, 62 F. (2d) 462, 464–465 (App.

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[24] The petitioner argues that he is denied due process because the Government supplies a transcript of the evidence when the court reporter is employed at an annual salary. This contention is based upon a misunderstanding of the practice. The Government no longer employs secretaries for the district judges at an annual salary requiring them to serve as secretary to the district judge *and* to report Government cases free of charge at the request of the Government. That was the situation in *Evans* v. *United States*, 312 U. S. 651. The petitioner also misstates the ruling of the Comptroller General (9 Comp. Gen. 503) when he says (Br. 46) that the Comptroller General ruled "that if the court reporter

D. C.). The Comptroller General ruled in 1930 in response to an inquiry by the Attorney General that the expense of paying a reporter to transcribe his notes for the use of a pauper on appeal from a federal conviction of murder could not be paid from the annual miscellaneous expense appropriation for the United States courts or from any other appropriation under the control of the Department of Justice. 9 Comp. Gen. 503. See also 21 Comp. Gen. 347. And the state courts, in the absence of statute, seem to have come to a like conclusion. *State* v. *Vicknair,* 118 La. 963; *Altis* v. *State,* 109 Neb. 776, 778; *State ex rel. Mahoney* v. *Ronald,* 117 Wash. 641.

II

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE VACATED AND THE CAUSE REMANDED TO THE DISTRICT COURT

We have shown in Point I, we submit, that the petitioner is not entitled to the relief which he

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were employed by the Government at an annual salary instead of on a piecework basis the question of requiring him to furnish a transcription to go into the pauper's record 'would be an administrative matter.'" The Comptroller General in ruling that the Department of Justice might not employ a reporter to make a transcript for a pauper went on to say "the question of requiring a stenographer employed upon an annual salary to furnish *an additional transcript if such stenographer reported the case* would be an administrative matter" [italics supplied]. Manifestly, what the Comptroller General had in mind was a case in which the Government might order a stenographer who was already typing the transcript to furnish an additional carbon copy for the pauper.

requested in the circuit court of appeals. We understand that the petitioner now requests, however, that the cause be remanded for the preparation of a bill of exceptions even though it is held that the petitioner is not entitled to the complete transcript.[35]. This request squarely raises the question whether the petitioner is foreclosed from this relief by his previous errors, first in abandoning any attempt to question the sufficiency of the evidence as soon as he learned that he could not afford to pay for a complete transcript, and second in seeking to compel the Government to furnish a transcript instead of asking leave to prepare a bill of exceptions by the other means available.

There can be no doubt of the power of the Court to remand the cause for the settlement of a proper bill of exceptions (*Ray* v. *United States*, 301 U. S. 158, 164–167; *Kay* v. *United States*, 303 U. S. 1; *Walker* v. *United States*, 113 F. (2d) 314 (C. C. A. 9)) even though the questions sought to be presented were not previously raised (cf. *Wiborg* v. *United States*, 163 U. S. 632; *Hemphill* v. *United States*, 312 U. S. 657; *Kessler* v. *Strecker*, 307 U. S. 22, 34).

If this case were to be judged by customary criteria, it would seem clear that the petitioner's request comes too late (see p. 14, n. 9, *supra*). But the petitioner was not represented by counsel

[35] This question was not raised in the circuit court of appeals and, apparently for that reason, was not considered

retained by him and did not personally abandon any rights. He asked the attorneys to question the sufficiency of the evidence but, upon learning that the petitioner could not purchase a complete verbatim transcript, they did not attempt to prepare a bill of exceptions by the other means available. Under these circumstances it would seem that the previous neglect of counsel should not itself prevent the appellate court from exercising its power to permit a remand for amendment of the bill of exceptions to raise the question of the sufficiency of the evidence to sustain the verdict.[36] In making this suggestion we do not imply that a defendant who is represented by appointed counsel may not be bound by their action; in such cases as in all others there must be an end of litigation. But in the instant case the mistake was not one of

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by the court or the United States Attorney on the petition for rehearing.

In his brief (p. 54), the petitioner also suggests that the judge should be directed on the remand to require his secretary to furnish the complete verbatim transcript free of charge. We have already shown this course to be improper (see pp. 24–25, *supra*).

[36] While we agree that the petitioner should not be held to have waived any rights, we cannot subscribe to the suggestions in petitioner's brief (p. 16) that the trial and appellate courts were derelict in their duties. The fact that the notice of appeal stated as one ground a challenge to the sufficiency of the evidence signified nothing; counsel frequently assign grounds at the outset which they abandon later.

tactical judgment and the matter sought to be raised is the fundamental issue of guilt or innocence.

There remains the question whether there is sufficient probability that a bill of exceptions can be settled to warrant a remand. The petitioner's notes (if any) and those of the attorneys may have been destroyed and their recollections of what occurred at the trial must have faded. But since the judge's secretary has volunteered to make dictaphone records, it should be possible for an attorney appointed to represent the petitioner to listen to the records and use them to supplement any other available means such as notes or the recollection of the petitioner and persons present at the trial. Whether these means will prove adequate can best be determined by the trial judge. To remand the cause for this purpose would not delay the administration of justice, for the petitioner already has elected to commence serving his sentence.

CONCLUSION

The Government should not be ordered to supply the petitioner with a complete verbatim transcript of the evidence at public expense; but the judgment of the circuit court of appeals should be vacated and the cause remanded to the circuit court of appeals with instructions to extend for a reasonable period the time for filing a complete bill of exceptions, and to remand the cause to the district court in order that the petitioner may pre-

pare a bill of exceptions and have it settled by any other means available.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

ARCHIBALD COX,
ROBERT S. ERDAHL,
WALTER J. CUMMINGS, Jr.,
Attorneys.

NOVEMBER 1942.

APPENDIX

DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY
Western District of Arkansas

July 10, 1942.

Re: *Jessie William Miller* v. *United States.* Your file WB: KB: ekh 109–367.

The ATTORNEY GENERAL,
Washington, D. C.

SIR: Your letter of July 10th, airmail, received this morning.

I immediately called by long distance telephone Mr. John Williams, Court Reporter and Secretary to Hon. Harry J. Lemley, the Judge who presided in this case, at his office in Texarkana, Arkansas, and received the following information:

That no request by Miller or by any lawyer representing him was ever made to Mr. Williams to transcribe his notes in this case. I was informed in my conversation with Mr. Williams this morning that Mr. Philip Alston, who was senior counsel in the case for Miller, happened to be present in Court Reporter Williams' office during our conversation, and Mr. Alston confirms the fact that no attempt was made by the defendant to secure a transcript of this testimony in full. I was further informed that both Judge Lemley and Court Reporter Williams would be very reluctant to

furnish a full transcript of this testimony and in this connection you will please consider the fact that Judge Lemley is one of the hardest worked Judges in the United States, and it would be next to impossible for his secretary to find the time to make this transcript and keep up with his regular work since the trial of the case occupied eight days, and the transcript would be very voluminous. The Court Reporter donated his services in taking the testimony in shorthand, and he states that he is willing to dictate the testimony into a dictaphone, and that the United States may then have a transcript made from the dictaphone records, and he estimates that the cost of typing the transcript from the dictaphone records will amount to from $500 to $600.

I note your comment that it is not clear that the government will be able to compensate a reporter for this work. Under present statutes it is settled beyond doubt that the Court Reporter in this case, who is a salaried secretary of the Judge, cannot charge the United States anything for this work regardless of any regulations which might or might not allow an independent court reporter to be paid for the work. It is my information that the Comptroller General has ruled that a transcript cannot be made at the expense of the United States under the circumstances existing in this case.

Mr. Berge, I want to assure you that no defendant was ever convicted in the Federal Court on clearer or more convincing evidence than this scoundrel. He is a brute of the lowest type and lacks every human sensibility. My first contact with the case was when an FBI Agent called me

over long distance from DeQueen, Arkansas, and related the substance of a preliminary investigation he had just made of the facts. It was evident that this agent was horrified and disgusted at the sheer brutality he had uncovered. I was frankly skeptical as to the advisability of prosecuting the case on account of the supposed fact that the victim was the stepdaughter of Miller, the defendant, but I agreed that a full investigation should be made. When this was done, I, too, was appalled at the facts disclosed. I am sending you herewith some photographs in a sealed envelope which will give you an inkling of the sadistic nature of this defendant. Please compare the picture of this young woman and her baby prior to the time they were kidnapped by this defendant with their pictures after they escaped from his custody and bear in mind that all of the time they were in his company this young woman was picking cotton, which is a remunerative occupation as farm labor goes. See for yourself how much of the income she earned she was permitted to use to buy the barest food for herself and baby.

It is very clear to me that the suspicions of the Circuit Court of Appeals and of the Justice of the Supreme Court who allowed the writ in this case were aroused by the action of Judge Lemley in reducing Miller's sentence from seven years to five years on his own motion as there is no showing in the records why this was done. As a matter of fact this reduction was made under the following circumstances:

Judge Lemley requested me to come to his chambers and upon my arrival I found the attorneys for Miller already there. Judge Lemley stated

that he had sentenced Miller for a term of seven years, calculated on the following basis: that he had taken the age of Miller's youngest child and given Miller a sentence that would insure that his youngest child would be old enough to be selfsupporting by the time Miller was released from prison and would have his or her habits and inclinations fairly well fixed and established, and that he was sure that Miller could not possibly make parole because of his previous record and self-evident criminal personality. Judge Lemley further stated that he was then informed that Miller's wife had secured a divorce from him or that she would very shortly secure one and was assured that Miller would not be permitted to have anything to do with rearing these children, no matter when he was released, and that under these circumstances he had decided to reduce the sentence by two years. I informed Judge Lemley that his action would likely be the source of unending trouble and embarrassment to the government in the case as it would be entirely unexplained and taken without explanation it indicated a doubt in his mind as to the propriety of Miller's conviction.

In conclusion, permit me to observe that if any convict in a Federal penitentiary can on his sole unsupported statement and without even the concurrence of the lawyers who represented him at his trial, cause the United States to go to all the trouble and expense merely to keep him in the penitentiary that Miller has caused the government in this case, then the whole system by which and under which prisoners are condemned needs to be drastically overhauled and improved. There must in every criminal case be a final judgment

and if this final judgment can only be secured by the United States, not simply by the verdict of the jury and sentence by the Court and affirmance by the Circuit Court of Appeals but by a prolonged investigation by the Circuit Court of Appeals and the Supreme Court of the United States into ex parte statements by the convicted defendant, then the personnel of these courts must be greatly enlarged for the majority of convicts will not hesitate to avail themselves of this privilege. I do not see how a decision of the Supreme Court of the United States in this case that the facts justified Miller's conviction will help the situation. The next convict will claim that the facts in his case are entirely different and so on ad infinitum.

This letter by air mail.

Respectfully,

(Signed) CLINTON R. BARRY,
Clinton R. Barry,
United States Attorney.

CRB:MC

DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY

Western District of Arkansas

FORT SMITH, ARKANSAS,
August 5, 1942.

Re: *Jesse William Miller* vs. *United States.*
Your File: WB:RSE:mgm.

The ATTORNEY GENERAL,
Department of Justice, Washington, D. C.

SIR: Reference is made to your letter of July 28, 1942, relative to the preparation of the transcript

for the appeal of Jesse William Miller from the District Court to the Eighth Circuit Court of Appeals.

After receiving your letter I immediately requested Mr. John T. Williams, Secretary to the Honorable Harry J. Lemley, and Official Court Reporter, to furnish me with the information requested in your letter. I am enclosing herewith the correspondence received from Mr. Williams and which is self-explanatory. You will note that Jesse William Miller, through his attorney, Mr. Phil G. Alston, requested Mr. Williams, the Court Reporter, to furnish a transcript pertaining only to that part of the case relative to the age of the victim and the facts surrounding the parental relationship between the victim and Jesse William Miller.

The age of the victim and the parental relationship was solely the only question of law involved in the case and that is whether or not the word *parent* as used in the Federal Kidnaping Act included a step-parent who had never been in loco parentis to said step-child. The defense of Jesse William Miller was based upon two questions. First, he did not kidnap her, which was the question of fact, and which was submitted to the jury upon proper instructions and which the jury found adversely to the contention of Jesse William Miller. Second defense being a question of law, that is, the victim being a minor and his being a step-parent of the victim brought him within the exceptions of the Federal Kidnaping Act, and this question was decided adversely to him in the Circuit Court of Appeals.

If there is any additional information desired please advise.

Respectfully,

CLINTON R. BARRY,
United States Attorney.
(Signed) THOMAS C. PITTS,
By: Thomas C. Pitts,
Assistant United States Attorney.

TCP ng.

[Copy]

UNITED STATES DISTRICT JUDGE'S CHAMBERS

EASTERN AND WESTERN DISTRICTS OF ARKANSAS

TEXARKANA, ARKANSAS, *August 4, 1942.*

HARRY J. LEMLEY
District Judge

Re: *Jesse William Miller* v. *United States.*

MR. CLINTON R. BARRY,
United States Attorney,
Fort Smith, Arkansas.

(Attention: Mr. Thos. C. Pitts, Asst. U. S. Attorney.)

DEAR MR. PITTS: I have your letter of August 3rd, transmitting to me request from the Attorney General as to what part of the record I was requested to transcribe in this case and the amount of money that Miller paid me for transcribing that part of the record I furnished him, and in reply would advise you as follows:

A day or two after Miller had been sentenced to serve seven years on the kidnapping charge by

Judge Lemley, inquiry was made to me by Mr. Philip G. Alston, one of Court appointed counsel for Miller, as to what would be the approximate cost for the entire trial record, to which I replied that the cost would be from $500 to $600 for a record 700 to 800 pages in length. The trial, you will recall, lasted seven days. Upon receiving this information, Mr. Alston informed me that it would not be possible to pay for the entire record.

A short time later Mr. Alston informed me that $100 had been turned over to him by Mrs. Miller to be used in prosecuting an appeal, and he offered to pay me $50 for my services in preparing such part of the trial record as might be necessary to prosecute an appeal based on the question of law in connection with the prosecuting witness' age. Such a record was prepared and delivered to Mr. Alston, who gave me a check for the $50 payment, and I gave Mr. Alston a statement and receipt, copy of which is attached hereto, which reflects that there is still a balance due me from Miller of $62.00.

I trust that the above is the information desired. With kind regards, I am,

Very truly yours,

(Signed) JOHN T. WILLIAMS,
John T. Williams,
Official Court Reporter.

JTW.
Encl.

[Copy]

UNITED STATES DISTRICT JUDGE'S CHAMBERS

EASTERN AND WESTERN DISTRICTS OF ARKANSAS

TEXARKANA, ARKANSAS, *August 4, 1942*

HARRY J. LEMLEY,
District Judge

Re: *Jesse William Miller* v. *United States.*

Mr. THOMAS C. PITTS,
Asst. United States Attorney,
Fort Smith, Arkansas.

DEAR TOM: By way of supplementing my earlier letter to you dated today, I would appreciate it if you would advise the attorney general that my courts convene beginning the early part of October, and if I am to dictate the record in the Miller case, I should like to be advised at as early a date as possible, in order that I may get it out of the way this summer, and so that my typist may get at it without delay, as there is a possibility that she will be otherwise occupied this fall.

With kind personal regards, I am,

Sincerely yours,

(Signed) JOHN T. WILLIAMS,
John T. Williams,
Official United States
District Court Reporter.

JTW.

[Copy]

In Account With

JOHN T. WILLIAMS

Official United States District Court Reporter

306 Federal Building

TEXARKANA, ARKANSAS, *March 6th, 1942.*

To: Mr. Jesse William Miller, c/o Hon. Phil G. Alston, Attorney at Law, Texarkana, Arkansas.

For: Per diem for reporting trial of case of *United States* vs. *Jesse William Miller and Artilla Miller,* in U. S. District Court, at Texarkana, Arkansas, January 27, 28, 29, 30, & 31, February 1 and 3, 1941:

7 days @ $10.00 per day		$70.00
Partial transcript of proceedings		
60 pages (1 original & 3 copies)	@ 70¢	42.00
Total		112.00
Paid on account, by check from Hon. Phil G. Alston, March 6, 1941		50.00
Balance due		62.00

DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY

Western District of Arkansas

FORT SMITH, ARKANSAS,
September 24, 1942.

Re: *Miller* vs. *United States.*

Hon. WENDELL BERGE,
Assistant Attorney General,
Department of Justice, Washington, D. C.

SIR: Your telegram in the above matter comes to my notice upon my return to Fort Smith from attending a regular term of court at Hot Springs.

We have no arrangements for reporting cases in which the United States is interested or for securing transcripts in such cases, whether civil or criminal. Under the statutes as they now stand, there is no way in which Secretary Reporter John T. Williams, in Judge Lemley's Court, can be paid, and the same situation exists in Judge Miller's Court with reference to Secretary Reporter Ben Mosley. Several years ago Mr. Mosley reported and furnished transcripts in some war risk insurance cases which were appealed by the United States and was paid for his services. Upon audit of the vouchers by the General Accounting office Mr. Mosley was required to repay several hundred dollars to the Treasurer, and since that time he has been fully aware of the statutes.

Both Mr. Williams and Mr. Mosley have been very generous in the amount of free work which

they have done for the United States in cases where it was vitally important to have testimony recorded and transcribed. They are subject to the orders of the respective judges whom they serve however, and these judges have emphatically stated that they will not permit them to do this work when it interferes in any way with their duties as secretary reporters.

The situation would not handicap the Government in this district in any way if any other reporter was available and could be used under special authorization. Unfortunately there is no stenographer in the district who can do this work and who is in position to accept the very occasional employment that would be involved. I make this statement with full knowledge whereof I speak, as I have during the past eight years made every possible effort to locate some stenographer who could do the work and who was available when needed. I interviewed the reporters of the state courts in the district and found that none of them would consider an arrangement of this kind because it would interfere with their work in their permanent positions.

The nearest place where a court reporter might be secured would be Little Rock, 160 miles from this city, and I am not able to give any assurance that one could be found there. In describing the situation here, I am not taking into consideration the adverse effect of the present war. As you know, every person who makes any pretense of being a stenographer is already employed in some position that requires their full time.

I have consistently and urgently called this situation to the attention of the Department of Justice at every conference of United States Attorneys held during the past eight years, and have urged other United States Attorneys under the same handicap to join me in urging the Department to ask Congress to do something about it. About two years ago, Mr. Alexander, United States Attorney at Topeka, Kansas, informed me that the United States had a contract with the Secretary Reporter to Judge Hopkins under which he was paid $500.00 per year flat to report and furnish transcripts to the Government in any case the United States Attorney desired to have reported. I asked Mr. Alexander how such an arrangement could be approved under the statute which prohibits extra compensation being paid to any person in the employ of the government under salary such as received by a judge's secretary, but he was unable to give me this information.

In the present case, as you have already been informed, Mr. Williams reported the testimony without charge. I do not know whether Judge Lemley requested him to do this or not. It was my understanding and I was so informed by some peace officer at the trial, that Miller had $150.00 in cash with him when he came to Texarkana for the trial. His affidavit as a poor person had been made and acted on by the Court several weeks before the trial, but in view of the fact that he was charged with a capital offense I did not feel disposed to call the Court's attention to the statement made to me that he was actually in position to pay at least a part of the costs. In addition to this, he

came to Texarkana in an automobile which I did not see, but which I am sure was a jalopy of very little value.

Respectfully,

(Signed) CLINTON R. BARRY,
Clinton R. Barry,
United States Attorney.

CRB/ng.

U. S. GOVERNMENT PRINTING OFFICE 1942